Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

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NO. 77-1403

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R. R. ROBINSON, dba DO-RITE GROCERY AND MARKET,

Petitioner

V.

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS,

Respondent

* * *

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

* * *

BRIEF FOR RESPONDENT IN OPPOSITION

* * *

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant

MARTHA E. SMILEY
Assistant Attorney General
Chief, Taxation Division

ROBERT LEE LATTIMORE
Assistant Attorney General

P.O. Box 12548,
Capitol Station
Austin, Texas 78711

Counsel For Respondent

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Respondent, Bob Bullock, Comptroller of Public Accounts of the State of Texas, respectfully submits the following brief in opposition to the issuance of a writ of certiorari as prayed for by Petitioner.

QUESTIONS PRESENTED

Petitioner's contention is that he was denied due process in the State Court by reason of the State Tax Law requiring prepayment as prerequisite of judicial review failing to afford him an adequate remedy at law.

ARGUMENT

ADEQUATE STATE JUDICIAL REVIEW:

The issue presented by the taxpayer was resolved by this Court in GREAT LAKES DREDGE & DOCK CO. V. HUFFMAN, 319 U.S. 293, (1943). There this Court held that prepayment as a prerequisite to judicial review does not prevent application of 28 U.S.C., sec. 1341, which withholds relief in cases involving state tax administration when the state legislature has provided an adequate scheme whereby the taxpayer may maintain suit to challenge the state tax. BLAND V. McHANN, 463 F.2d 21 (5th Cir. 1972), cert. denied, 410 U.S. 966, SHEPHERD, INC., V. MONAGHAN, 256 F.2d 882 (5th Cir. 1958); STERLING SHOE CO. V. NORBERG, 411 F. Supp. 128. (D.C.R.I. 1976).

In the light of the prevailing Federal judicial policy of abstention from disturbing the jurisdiction of the state forums "out of scrupulous regard for the rightful independence of the state governments", Respondent points out that section (2) of Article 1.06, Tax.-Gen., Vernon's Texas Civil Statutes, allows the aggrieved taxpayer to file a *bond* in lieu of prepayment of the tax as a prerequisite for enjoining the collection of the tax. This less onerous provision of the "protest" statutes, does not appear in the Appendices to Petitioner's Petition, but same is shown as an appendix to this Opposition Brief. Thus, it is obvious that Petitioner at any time during the years of his operation of his store at an advantage over his competitors who paid their beer taxes, could have filed a bond and sought an injunction in the State Court against the collection of the taxes on the beer sold by him.

WAIVER OF DAY IN COURT:

The judgment which Petitioner seeks to have reviewed is shown on pages 19 - 21, as Appendix B of his Petition. In that case Petitioner brought suit to enjoin the State Comptroller from collecting taxes on his sales of beer, claiming that beer came under the food exemption of the sales tax law. Respondent Comptroller filed a counter claim in said suit for the tax delinquency and the trial court rendered a summary judgment dismissing Petitioner's cause of action because of non-compliance with the "protest" statutes, and granting Respondent Comptroller's counter claim for taxes. No summary judgment proof was submitted by Petitioner in opposition to Respondent Comptroller's counter claim. Upon appeal the dismissal was affirmed but the counter claim of the Comptroller was reversed and remanded to the trial court because of the failure of Respondent to attach the Certificate of delinquency to the Motion for Summary Judgment, although it was on file as an exhibit to the counter claim and was referred to in the Motion. After the issuance of the mandate, Respondent Comptroller amended his motion for summary judgment and presented it for hearing to the trial court. Although duly notified through his attorneys of record of such hearing, Petitioner again failed to offer any opposition to Respondent's motion, evidentiary or otherwise, other than filing at the last minute with the clerk but not calling same to the attention of the court or the Respondent Comptroller, a purported motion for stay of proceedings pending a request for stay to be presented to Justice Powell, and a proposed Petition for Certiorari to be filed with this Honorable Court. Thereupon, the trial court on the 30th day of March, 1978, granted Respondent Comptroller's Amended Motion for Summary Judgment on his counter claim for taxes.

In the meantime, the Respondent Comptroller instituted another suit against Petitioner to enjoin him from conducting a retail business without a valid sales tax permit. This is the lawsuit Petitioner refers to on Page 7 of his Petition. This suit was filed by an attorney in another section of the Texas Attorney General's Tax Division from the section that handled the cause here complained of by Petitioner, and, however worded, its legal effect can be only regulatory and punitive in nature. The aforesaid summary judgment of date March 30, 1978, has pre-emptive rights over Petitioner's tax delinquency to the extent covered thereby. Petitioner need not fear that the State of Texas will attempt to collect the same tax delinquencies twice.

From the foregoing, it is apparent that Petitioner Robinson, without even having to file a bond in compliance with the "protest" statutes, had two separate "days in court" in which to have this theory of tax exemption adjudicated by the State Court. He failed to take advantage of either occasion offered to him both of which were free of any burden of bond filing or prepayment of taxes. These shunned opportunities to have his exemption claim fully litigated seem to raise a question whether Respondent's real motive in this action is to impede the State's ability to secure the collection of its sales tax revenues rather than just to secure an exemption for the sale of beer.

NO STANDING TO COMPLAIN:

Another such free opportunity for litigation is now open to Petitioner by virtue of the aforesaid pending injunction suit. By a simple answer filed therein, without putting up bond or paying any money, he can force an adjudication of his exemption claim, if that is the real object of his Petition for writ of certiorari. While these waived opportunities to be heard might not be

definitive of the due process offered by a tax system, they surely should negate Petitioner standing to complain of "irreparable injury" with "no adequate remedy under the law". So, it appears that whatever hardship that Petitioner is now complaining of was brought about and continues because of his refusal to avail himself of the obvious legal remedies for obtaining his day in court, without denuding himself of his property, as fearfully voiced by his attorney, Mr. Claude R. Wilson, Jr., of Dallas, Texas (Appendix C of Petition, pp. 32-33).

CONCLUSION

For the foregoing reasons it is clear that Petitioner Robinson has suffered no deprivation of due process in the premises, and is without standing to complain of undue hardship cause by the sales tax law; therefore, writ of certiorari should not issue to review the judgment of the Supreme Court of Texas in this matter.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant

MARTHA E. SMILEY
Assistant Attorney General
Chief, Taxation Division

R. L. LATTIMORE
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711

Counsel for Respondent

PROOF OF SERVICE

I hereby depose and say that I am a member of the Bar of the United States Supreme Court and this ___ day of April, 1978, I served three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari on Petitioner R. R. Robinson by depositing the same in the United States Post Office addressed to the Hon. Hugh Corrigan, IV, one of his counsel of record, at his post office address, 2300 Republic National Bank Tower, Dallas, Texas, 75201 with Certified, Return Receipt Requested, first class postage prepaid.

R. L. LATTIMORE

Subscribed and sworn to before me in Austin, Travis County, Texas, this ___ day of April, 1978.

NOTARY PUBLIC, Travis
County Texas

My Commission
Expires:

APPENDIX

(2) Provided, however, that unless otherwise provided by Statute, said applicant may, in lieu of paying such taxes, fees and penalties into the suspense account of the State Treasurer, file with said Treasurer a good and sufficient *bond* to guarantee the payment of such taxes, fees and penalties in an amount equal to twice the amount of all taxes, fees and penalties then due and which may reasonably be expected to become due during the pendency of said injunction. The amount of such bond and the sureties thereon shall be approved by and acceptable to the judge of the court granting said injunction and the Attorney General of this State and the application for said restraining order or injunction shall reflect under oath of the applicant, his agent or attorney, that said bond has been approved and filed as aforesaid. Whenever it appears to the Attorney General that any such bond has become insufficient to cover double the amount of the taxes, fees and penalties accruing subsequent to the granting of said injunction, the said Attorney General shall demand of said applicant that additional bond be filed.